FEDERAL COMMUNICATIONS COMMISSION Washington, D. C. 20554

OFFICE OF MANAGING DIRECTOR

JUL 19 1993

Gregg P. Skall, Esq. Pepper & Corazzini 1776 K Street, N.W. Washington, D.C. 20006

Dear Mr. Skall:

This is in reference to the letter of July 7, 1993, in which the request for refund of a hearing fee filed on behalf of Mr. Charles Fitzgerald was granted. According to our records, the original check filed on behalf of Mr. Fitzgerald was drawn in the amount of \$6,800.00. Therefore, a check, made payable to the maker of the original check and drawn in that amount, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett Associate Managing Director

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for Operations

FEDERAL COMMUNICATIONS COMMISSION Washington, D. C. 20554

OFFICE OF MANAGING DIRECTOR JUL 7 1993

Gregg P. Skall, Esq. Pepper & Corazzini 1776 K Street, N.W. Washington, D.C. 20006

Dear Mr. Skall:

This will respond to your request for refund of a hearing fee filed on behalf of Mr. Charles Fitzgerald in connection with his construction permit application for a new television station at Jacksonville, North Carolina.

You state, and your documentation demonstrates, that prior to the Notice of Appearance deadline, Mr. Fitzgerald entered into a settlement agreement with his competing applicants. presiding judge approved the settlement agreement, dismissed Mr. Fitzgerald's application, and granted the single remaining application. Under the circumstances, since the settlement agreement was timely filed and the remaining application was immediately grantable, refund of the hearing fee is appropriate under 47 C.F.R. § 1.1111(b)(4).

Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of \$6,760.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely, Marilyn J. 84ª Dermet Marilyn J. McDermett

Associate Managing Director

for Operations

VINCENT A PEPPER
ROBERT F. CORAZZINI
PETER GUTMANN
JOHN F. GARZIGLIA
NEAL J. FRIEDMAN
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May 18, 1993

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OBERT LEWIS THOMPSON

ROBERT LEWIS THOMPSO GREGG P. SKALL E-THEODORE MALLYCK OF COUNSEL FREDERICK W. FORD

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OFFICE OF MANAGING DIRECTOR

Mr. Andrew S. Fishel, Managing Director Office of Managing Director Federal Communications Commission 1919 M Street, N.W., ROOM 852 Washington, DC 20554

> Re: Application of Charles Fitsgerald Request for Refund of Hearing Fee (FCC File No. BPCT-920114KF) New TV Station, Channel 35 Jacksonville, North Carolina

Dear Mr. Fishel:

On behalf of Charles Fitzgerald, we respectfully request that the Commission authorize the United States Department of Treasury to issue Mr. Fitzgerald a check in the amount of \$6,760.00 as a refund of the hearing fee that Mr. Fitzgerald paid in the above-referenced proceeding. Mr. Fitzgerald paid his hearing fee pursuant to the Commission's Public Notice of Acceptance for Filing, Report No. A-174, released December 13, 1991, which payment was acknowledged in the BAPS Facilities/Application Information Report, a copy of which is attached hereto.

On April 26, 1993, the Presiding Judge in MM Docket No. 92-309 approved the Settlement Agreement between Local Television Associates, Inc. ("LTA") and Mr. Fitzgerald. The Agreement was first filed on February 1, 1993, within the time set by the notice of appearance in the Hearing Designation Order in this case, released January 11, 1993, copy attached. The Memorandum Opinion and Order issued by the Administrative Law Judge on April 26, 1993, approved the final version of the Settlement Agreement, dismissed all applicants other than LTA, and essentially deleted all outstanding issues contained in the Hearing Designation Order.

Accordingly, Mr. Fitzgerald is entitled to a refund of this hearing fee, pursuant to Section 1.1111(b)(4) of the Commission's

Mr. Andrew S. Fishel May 18, 1993 Page 2

Rules. See Establishment of a Fee Collection Program, 2 FCC Rcd. 947 (1987), as modified, 3 FCC Rcd. 5987, 5990 ¶¶ 27-31. Moreover, if the Managing Director deems the additional showings required of LTA by the Administrative Law Judge to be a "directive," Mr. Fitzgerald's fee should still be returned as he was not a party required to submit a further showing.

Accordingly, Charles Fitzgerald requests that the Commission authorize a refund of the hearing fee as expeditiously as possible. Please direct any questions or correspondence concerning this matter to the undersigned.

Sincerely

Grego V/Ska

Charles Fitzgerald

Enclosures

Before the Federal Communications Commission Washington, D.C. 20554

MM Docket No. 92-309

In re Applications of

LOCAL TELEVISION

File No. BPCT-911106KF

ASSOCIATES, INC.

CHARLES FITZGERALD

File No. BPCT-920114KF

WEBBER/MOORE

File No. BPCT-920114KG

BROADCASTING COMPANY LIMITED PARTNERSHIP

LP MEDIA
INCORPORATED

File No. BPCT-920113KE (Application Dismissed)

For Construction Permit Jacksonville, North Carolina

HEARING DESIGNATION ORDER

Adopted: December 15, 1992; Released: January 11, 1993

By the Chief. Video Services Division:

- 1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it the above-captioned mutually exclusive applications to construct a new commercial television station on Channel 35. Jacksonville, North Carolina.
- 2. The Commission's Rules require mutually exclusive applicants for broadcast facilities to pay their hearing fees before they are designated for a comparative hearing. Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, 6 FCC RCD 157. 158. recon. gid. in part, 6 FCC Rcd 3403 (1991). Failure to make the hearing fee payment in a timely manner mandates dismissal of an application, 47 C.F.R. § 1.1107(b). On January 24, 1992, the Commission released a Public Notice. Report No. B-160, listing the competing applications for Channel 35, Jacksonville, North Carolina. LP Media Incorporated's application was among those listed. The notice established April 8, 1992, as the deadline for the filing of the hearing fee. LP Media Incorporated did not file the required hearing fee. Therefore, LP Media Incorporated's application will be dismissed pursuant to 47 C.F.R. § 1.1107(b).
- 3. Section 73.3555(a)(3) of the Commission's Rules states that no license for a television broadcast station shall be granted to any party, if such party directly or indirectly owns, operates, or controls one or more broadcast stations in the same service and the grant of such license will result in any overlap of the Grade B contours of the existing and proposed TV stations, computed in accordance with Section 73.384. Local Television is the licensee of television

station WFXI. Morehead City, North Carolina. The Grade B contour of Local Television's proposed television station will overlap with the Grade B contour of station WFXI. Morehead City, North Carolina. However, Local Television has represented to the Commission that it will divest its interest in WFXI, Morehead City, North Carolina, prior to the commencement of operation of Channel 35, Jackson-ville, North Carolina, if Local Television is the successful applicant. Accordingly, any grant of a construction permit to Local Television will be conditioned upon its divestiture of all its interest in, and connection with, television station WFXI.

- 4. Charles Fitzgerald identifies his tower site coordinates at 34° 29′ 28″ latitude; however, the Federal Aviation Administration (FAA) describes the tower to be located at coordinates 34° 29′ 38″ latitude. There is a discrepancy in the coordinates, and we have not received a final determination from the FAA that Mr. Fitzgerald's proposed tower height and location would not constitute a hazard to air navigation. Accordingly, an appropriate issue will be specified.
- 5. Except as indicated by the issues specified below, the applicants are qualified to construct and operate as proposed. Since these applications are mutually exclusive, the Commission is unable to make the statutory finding that their grant will serve the public interest, convenience and necessity. Therefore, the applications must be designated for hearing in a consolidated proceeding on the issues specified below.
- 6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:
 - 1. To determine, with respect to Charles Fitzgerald, whether there is a reasonable possibility that the tower height and location proposed would constitute a hazard to air navigation.
 - 2. To determine which of the proposals would, on a comparative basis, best serve the public interest.
 - 3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.
- 7. IT IS FURTHER ORDERED. That, the application for LP Media, Inc., IS DISMISSED, pursuant to 47 C.F.R. § 1.1107(b).
- 8. IT IS FURTHER ORDERED. That in the event of a grant of Local Television Associates. Inc.'s application, it will be conditioned as follows:

Prior to the commencement of operation of the television station authorized herein, permittee shall certify to the Commission that it has divested itself of all interest in, and connection with WFXI(TV). Morehead City, North Carolina.

9. IT IS FURTHER ORDERED. That the Federal Aviation Administration IS MADE A PARTY RESPONDENT to this proceeding with respect to issue 1.

- 10. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief. Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record. Hearing Branch. Enforcement Division. Mass Media Bureau, Federal Communications Commission 2025 M Street. N.W.. Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Video Services Division, Mass Media Bureau, Federal Communications Commission. Room 700, 1919 M Street, N.W., Washington, D.C. 20554.
- 11. IT IS FURTHER ORDERED. That to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order. Pursuant to Section 1.325(c) of the Commission's Rules, within five days after the date established for filing notices of appearance, the applicants shall serve upon the other parties that have filed notices appearance the materials listed in: (a) the Standard Document Production Order (see Section 1.325(c)(1) of the Rules); and (b) the Standardized Integration Statement (see Section 1.325(c)(2) of the Rules), which must also be filed with the presiding officer. Failure to so serve the required materials may constitute a failure to prosecute, resulting in dismissal of the application. See generally Proposals to Reform the Commission's Comparative Hearing Process (Report and Order in Gen. Doc. 90-264), 6 FCC Rcd 157, 160-1, 166, 168 (1990), Erratum. 6 FCC Rcd 3472 (1991). recon. granted in part, 6 FCC Rcd 3403 (1991).
- 12. IT IS FURTHER ORDERED. That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman Chief, Video Services Division Mass Media Bureau

Before the FEDERAL COMMUNICATIONS COMMISSION Washington, D.C. 20554

FCC 93M-187 31340

In re Applications of)	MM DOCKET NO. 92-309
LOCAL TELEVISION ASSOCIATES, INC.)	File No. BPCT-911106KF
CHARLES FITZGERALD)	File No. BPCT-920114KF
WEBBER/MOORE BROADCASTING COMPANY)	File No. BPCT-920114KG
LIMITED PARTNERSHIP)	
For Construction Permit for a New Commer-)	
cial Television Station on Channel 35)	
in Jacksonville, North Carolina)	

MEMORANDUM OPINION AND ORDER

Issued: April 22, 1993 Released: April 26, 1993

- 1. Under consideration are "Joint Motion For Approval Of Settlement" filed February 1, 1993 by Local Television Associates, Inc. (LTA), Charles Fitzgerald (Fitzgerald), and Webber/Moore Broadcasting Company, Partnership (Webber/Moore), Supplement To Joint Request For Approval Of Agreement filed February 5, 1993 by LTA, Supplement To Joint Request For Approval Of Agreement filed February 9, 1993 by Webber/Moore, Mass Media Bureau's Comments On Joint Motion For Approval Of Settlement And Related Pleadings filed February 19, 1993, Supplement To Joint Request For Approval Of Settlement Agreement filed April 6, 1993 by Fitzgerald and LTA, Comments Of Webber/Moore Broadcasting Company Limited Partnership filed April 6, 1993, Supplement filed April 8, 1993 by LTA, and Supplement To Joint Motion For Approval Of Settlement Agreement And Dismissal Of Application Of Charles Fitzgerald filed April 12, 1993 filed by Fitzgerald, Supplement To Settlement Affidavit filed April 14, 1993 filed by Fitzgerald; "Petition For Leave To Amend And Request For Authority For Satellite Operation" filed February 1, 1993 by LTA, Supplement To Petition For Leave To Amend filed February 9, 1993 by LTA, Supplement To Petition For Leave To Amend And Request For Authority For Satellite Operation filed April 6, 1993 by LTA, and Mass Media Bureau's Comments On Supplement To Petition For Leave To Amend And Request For Authority For Satellite Operation filed April 15, 1993; and "Technical Amendment" filed February 5, 1993 by Fitzgerald.
- 2. LTA seeks approval of an agreement providing for the grant of its application and the dismissal of the Fitzgerald and Webber/Moore application in exchange for monetary consideration. LTA also seeks permission to operate

¹ The settlement agreement originally provided for the merger of the Fitzgerald and LTA applications. The supplement to the joint request eliminated the merger and provided instead for the dismissal of the Fitzgerald application in exchange for monetary consideration.

as a satellite of LTA's station WFXI-TV, Morehead City, North Carolina.

- 3. The settlement agreement provides for reimbursement of Webber/Moore's expenses in preparing and prosecuting its application in an amount of up to \$12,000 and to Fitzgerald in an amount up to \$30,000. Also, the agreement provides for an additional payment of \$6,760 to Fitzgerald should he be unsuccessful in obtaining a refund of his hearing fee. Webber/Moore and Fitzgerald have established that the amount to be reimbursed by LTA does not exceed their reasonable and prudent expenses. Additionally, the parties have established that dismissal of Webber/Moore's and Fitzgerald's applications and the grant of LTA's application is in the public interest since it will facilitate prompt initiation of a new service in Jacksonville and the applications were not filed for an improper purpose.
- 4. The settlement reached by the parties is contingent on the grant of a petition for a leave to amend filed February 1, 1993 seeking acceptance of an amendment permitting the proposed Jacksonville station to operate as a satellite of station WFXI(TV). In its Satellite Policy Statement, 6 FCC Rcd 4212, 4213-4214 (1991), the Commission stated that applicants for television satellite status are entitled to a presumption that the proposed satellite operation is in the public interest if the applicants meet the following three criteria: (1) there is no City Grade overlap between the parent and the satellite; (2) the proposed satellite would provide service to an underserved area; and (3) no alternative operation is ready and able to construct or to purchase and operate the satellite as a full-service station. Here, there is no city grade overlap and the proposed station would provide service to an underserved area. Thus, the first two hurdles are met.
- 5. In satisfaction of the third criteria, LTA argues that the operation of the Jacksonville station as a full-service station is not economically feasible. In support of this proposition LTA submits historical market data; the declaration of Millard S. Younts, a media broker familiar with the market; a declaration and study prepared by Susan Harrison of Harrison, Bond & Pecaro, a nationally known firm specializing in broadcast financial analysis; local governmental economic data; the declarations of the principals of the three

² The Bureau supports the requests for relief.

³ The amendment also seeks to amend LTA's technical showing in order to adopt the Fitzgerald technical proposal and to amend the application to delete the divestiture commitment for station WFXI(TV). Good cause has been shown for grant of the requested relief. Also included in the amendment are steps proposed to effectuate the merger between LTA and Fitzgerald which are now moot and will be dismissed.

Applicants can demonstrate that the area is underserved using one of two tests. The first is a "transmission test" in which the proposed satellite's community of license is considered underserved if two or fewer full-service stations are already licensed to it. Satellite Policy Statement, 6 FCC Rcd at 4215. Only one full time station, WUNM-TV is licensed to Jacksonville, WUNM is a satellite of WUNC-TV, Chapel Hill, North Carolina.

applicants; and supporting Commission precedent. On the basis of LTA's extensive showing, the Presiding Judge concludes that LTA has convincingly demonstrated that operation of the Jacksonville station as a full service station is not economically viable and that the proposed satellite operation is in the public interest.

- 6. Jacksonville is a community of some 28,780 persons. Jacksonville is located in Onslow County, which is along the Atlantic coast a considerable distance to the south of the center of the Greenville-New Bern-Washington market, where the Jacksonville facility would be located. The market, ADI number 104, is already served by four VHF stations and an independent UHF station, WYDO(TV). WYDO(TV), in order to be economically viable, has entered into an LMA, rebroadcasting WFXI(TV) during a substantial portion of the day. Moreover, the channel at issue in this proceeding is available only because a prior construction permit for the channel was cancelled in March 1991. Also, other construction permit applications in, and just outside the Greenville-New Bern-Washington market have met similar fates. As pointed out by LTA, the Commission has granted authority for unbuilt television stations to operate as satellites in markets considerably larger than the one involved here including the top 25 ADI of Denver, Colorado.
- 7. Further, as reflected in local government reports submitted by LTA, Onslow County has suffered a severe economic decline in recent years. Among other things, four Onslow County manufacturing plants have closed and the unemployment rate increased by January 1991 to 6.75%. Further, the county's economy is seasonal due to its coastal location and thus a very large portion of the county's employed persons work in jobs that are part-time and/or extremely low-paying. Adding to the difficulty is the cutting of national defense spending, seriously impacting Camp Lejeune, a principal economic contributor. The situation is much the same in adjacent Carteret County. The Harrison study also shows that the market population is substantially poorer and less well educated than national average and that effective buying income and retail sales per household are well below national averages. In this connection, Jacksonville is ranked 321st out of the 333 metropolitan areas ranked in the Places Rated Almanac.
- 8. Additionally, Harrison's study demonstrates that, even given the most optimistic set of assumptions possible, the station would lose well over a million dollars in its first five years of operation. This figure is only for an operational loss and does not include repayment of the costs of construction or any return on investment for the prospective operator. In this connection, Harrison projects the station to operate at the same cost for five years, when in fact most stations face increased costs over time. Also, she projects that the station on its first day of service will achieve a ratings level in the market not achieved by any independent station in any market smaller than number 77 (Las Vegas, Nevada). Therefore, it is abundantly clear, given these facts, that the financial prospects for a full-service station are extremely poor.

⁵ The proposed station covers less than half of the area within its market with a Grade B signal.

9. Finally, LTA has submitted the declaration of Millard Younts, a media broker familiar with the market. Younts asserts that he has made a number of inquiries as to the purchase of a stand-alone UHF station in the market and has received no indication of interest; that over the past six months two commercial television stations in the market have been offered by his company as possible for sale and none of these inquiries have ripened into even an expression of interest to buy; and that based on his experience, no prudent person would wish to build or operate a new UHF station in this market. Younts' declaration buttresses the conclusion that no alternative operator is ready and able to construct a full-service UHF station. Accordingly, LTA's request to operate the Jacksonville station as a satellite of WFXI(TV) will be granted subject to the condition that a main studio for the Jacksonville station is maintained for that community.

Accordingly, IT IS ORDERED, That the "Petition For Leave To Amend And Request For Authority For Satellite Operation" filed February 1, 1993 IS GRANTED to the extent of accepting LTA's amended technical showing adopting the Fitzgerald technical proposal, deleting the divestiture commitment for station WFXI(TV), Morehead City, North Carolina, and permitting the Jacksonville station to operate as a satellite of station WFXI(TV); and DISMISSED in all other respects.

IT IS FURTHER ORDERED, That the "Joint Motion For Approval Of Settlement" filed February 1, 1993 IS GRANTED; the settlement agreement, as supplemented, IS APPROVED; the applications of Charles Fitzgerald and Webber/Moore Broadcasting Company, Limited ARE DISMISSED; and the application of Local Television Associates, Inc. IS GRANTED subject to the following condition:

That Local Television Associates, Inc. shall construct and maintain a main studio within six (6) months after the date of commencement of program test authority.

IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin

Administrative Law Judge

⁶ In its Supplement filed April 8, 1993, LTA has stated its intent to maintain a main studio for Jacksonville. Page 12, note 5.



PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION 1919 M STREET N.W. WASHINGTON, D.C. 20554

20924

News media information 202/632-5050. Recorded listing of releases and texts 202/632-0002.

TV BROADCAST APPLICATIONS ACCEPTED FOR FILING AND NOTIFICATION CUT-OFF DATE

Report No. A-174

Released: December 13, 1991

CUT-OFF DATE: January 13, 1992

NOTICE is hereby given that the applications listed below are accepted for filing and will be considered to be ready and available for processing after January 13, 1992. In order for an application to be considered with one of the applications listed below or with any other application on file by the close of business on January 13, 1992, which involves a conflict necessitating a hearing with any application on this list, it must be substantially complete and tendered for filing with the Commission in accordance with Section 0.401 of the Commission's Rules no later than January 13, 1992.

Petitions to deny the applications listed below must be on file with the Commission no later than January 13, 1992.

BPCT-911029KF

Rio Grande City, Texas

CAROLINE K. POWLEY D/B/A UNICORN/LRGV

Channel 40

ERP(Vis): 7.5 kW; HAAT: 420.2 ft. (128.1 m.)
Tower site: KCTM(FM) tower, 4.3 miles ENE of Rio

Grande City, Texas

BPCT-911029KG

Springville, New York

CAROLINE K. POWLEY D/B/A UNICORN/SPRINGVILLE

Channel 67

ERP(Vis): 15.0 kW; HAAT: 437.9 ft. (135.5 m.)
Tower site: W80AK translator tower, approximately

O loo Mar of the boundary Marie Marie

2 km NW of West Valley, New York

BPCT-9111106KF

Jacksonville, North Carolina

LOCAL TELEVISION ASSOCIATES, INC.

Channel 35

ERP(Vis): 1,400 kW; HAAT: 833.1 ft. (254m.)

Tower site: WSFL(FM) tower, 2.5 km South of Trenton,

North Carolina

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